



SECRETARY OF THE AIR FORCE  
WASHINGTON

NOV 21 1999

MEMORANDUM FOR ALMAJCOM-FOA-DRU/CC

SUBJECT: Consultation with American Indians and Alaska Native  
Organizations

On 20 October 1998, Secretary Cohen signed the Department of Defense American Indian and Alaska Native Policy (attachment 1). The policy emphasizes the importance of respecting and consulting with tribal governments on a government-to-government basis. Secretary Cohen formulated a uniform version of the policy to ease implementation by DoD Components and their major commands and installations. The policy includes President Clinton's Executive Memorandum on "Government-To-Government Relations with Native American Tribal Governments," Executive Order 13007 "Indian Sacred Sites," and Executive Order 13084 "Consultation and Coordination with Indian Tribal Governments." These policies and directives should be implemented by commanders at all levels in consultation with tribal government leaders. To assist in interpreting the policy, I have also enclosed an annotated version of the policy (attachment 2) which will soon be signed by the Deputy Under Secretary of Defense (Environmental Security).

I want all commanders to know that I am committed to these policies and directives and expect them to establish and maintain effective work relationships with tribal governments. Effective consultation with tribal governments will support accomplishing our goals to sustain readiness, protect natural and cultural resources, and fulfill our Federal trust responsibilities.

Please see that this memorandum receives widest dissemination.

A handwritten signature, likely of the Secretary of the Air Force, is written in dark ink. The signature is stylized and appears to be "F. A. [unclear]".

Attachments:

1. DoD American Indian and Alaska  
Native Policy
2. Annotated Policy

Department of Defense  
American Indian and  
Alaska Native Policy

PREAMBLE

These principles establish the Department of Defense's (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as "tribes"<sup>1</sup>). These principles are based on tribal input, federal policy, treaties, and federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes<sup>2</sup>, DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.<sup>3</sup>

<sup>1</sup> As defined by most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the Federally Recognized Indian Tribe List Act.

<sup>2</sup> This policy is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

<sup>3</sup> Definition of Key Terms:

**Protected Tribal Resources:** Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.

**Tribal Rights:** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

**Indian Lands:** Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual, or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.



### I. TRUST RESPONSIBILITIES

DoD will meet its responsibilities to tribes. These responsibilities are derived from:

- Federal trust doctrine (i.e., the trust obligation of the United States government to the tribes);
- Treaties, Executive Orders, Agreements, Statutes, and other obligations between the United States government and tribes, to include:
  1. Federal statutes (e.g., Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, National Historic Preservation Act, Alaska National Interest Lands Conservation Act, Alaskan Native Claims Settlement Act, and Archeological Resources Protection Act); and
  2. Other federal policies (e.g., Executive Order 12898, "Environmental Justice"; Executive Order 13007, "Indian Sacred Sites"; Executive Order 13021 "Tribal Colleges and Universities"; "Executive Memorandum: Government to Government Relations with Native American Tribal Governments," dated 29 April 1994; and Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments").

DoD will annually review the status of relations with tribes to ensure that DoD is:

- Fulfilling its federal responsibilities; and
- Addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands.

### II. GOVERNMENT TO GOVERNMENT RELATIONS

Build stable and enduring relationships with tribes by:

- Communicating with tribes on a government-to-government basis in recognition of their sovereignty;
- Requiring meaningful communication addressing tribal concerns between tribes and military installations at both the tribal leadership-to-installation commander and the tribal staff-to-installation staff levels;
- Establishing a senior level tribal liaison in the Office of the Secretary of Defense and other appropriate points of contact within DoD to ensure that tribal inquiries are channeled to appropriate officials within DoD and responded to in a timely manner;
- Providing, to the extent permitted by DoD authorities and procedures, information concerning opportunities available to tribes to: 1) compete for contracts, subcontracts, and grants, and participate in cooperative agreements; 2) benefit from education and training; 3) obtain employment; and 4) obtain surplus equipment and property;
- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made;
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests for information from tribes.

### III. CONSULTATION

Fully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

- Recognizing that there exists a unique and distinctive political relationship between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority;
- Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to by the particular tribe and DoD, including necessary dispute resolution processes;
- Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;
- Consulting in good faith throughout the decision-making process; and
- Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.

### IV. NATURAL AND CULTURAL RESOURCES PROTECTION

Recognize and respect the significance tribes ascribe to certain natural resources and properties of traditional or customary religious or cultural importance by:

- Undertaking DoD actions and managing DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights to fish, hunt, and gather resources at both on- and off-reservation locations;
- Enhancing, to the extent permitted by law, tribal capabilities to effectively protect and manage natural and cultural tribal trust resources whenever DoD acts to carry out a program that may have the potential to significantly affect those resources;
- Accommodating, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred and off-reservation treaty fishing, hunting, and gathering sites located on military installations; and
- Developing tribal specific protocols to protect, to the maximum extent practicable and consistent with the Freedom of Information Act, Privacy Act, National Historic Preservation Act, and Archeological Resources Protection Act, tribal information regarding protected tribal resources that has been disclosed to, or collected by, the DoD.



WILLIAM S. COHEN  
SECRETARY OF DEFENSE

October 20, 1998

## U.S. Department of Defense

### GOVERNMENT-TO-GOVERNMENT RELATIONS WITH NATIVE AMERICAN TRIBAL GOVERNMENTS APRIL 29, 1994

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.

I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

## American Indian and Alaska Native Policy

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON  
THE WHITE HOUSE,  
April 29, 1994

**INDIAN SACRED SITES  
EXECUTIVE ORDER 13007**

**May 24, 1996**

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

**WILLIAM J. CLINTON**  
**THE WHITE HOUSE,**  
**May 24, 1996**

**CONSULTATION AND COORDINATION  
WITH INDIAN TRIBAL GOVERNMENTS**

**EXECUTIVE ORDER 13084**

**May 14, 1998**

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities; to reduce the imposition of unfunded mandates upon Indian tribal governments; and to streamline the application process for and increase the availability of waivers to Indian tribal governments; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 2. Policymaking Criteria. In formulating policies significantly or uniquely affecting Indian tribal governments, agencies shall be guided, to the extent permitted by law, by principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for

responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

Sec. 3. Consultation. (a) Each agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that is not required by statute, that significantly or uniquely affects the communities of the Indian tribal governments, and that imposes substantial direct compliance costs on such communities, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected Indian tribal governments, a summary of the nature of their concerns, and the agency's position supporting the need to issue the regulation; and

(B) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by such Indian tribal governments.

Sec. 4. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribal governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribal government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

## U.S. Department of Defense

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(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. The agency shall provide the applicant with timely written notice of the decision and, if the application for a waiver is not granted, the reasons for such denial.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 5. Cooperation in developing regulations. On issues relating to tribal self-government, trust resources, or treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Independent agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 7. General provisions. (a) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(b) This order shall supplement but not supersede the requirements contained in Executive Order 12866 ("Regulatory Planning and Review"), Executive Order 12988 ("Civil Justice Reform"), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(c) This order shall complement the consultation and waiver provisions in sections 4 and 5 of the Executive order, entitled "Federalism," being issued on this day.

(d) This order shall be effective 90 days after the date of this order.

WILLIAM J. CLINTON  
THE WHITE HOUSE,  
May 14, 1998



Rec'd 4 Nov



ACQUISITION AND  
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON DC 20301-3000

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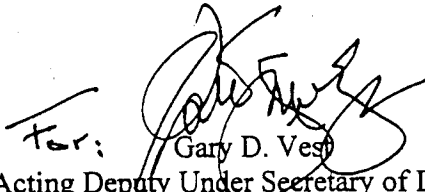
MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH),  
OASA (IL&E)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY  
AND LEGISLATION), OASA (CIVIL WORKS)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(ENVIRONMENT AND SAFETY), OASN (I&E)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(ENVIRONMENT, SAFETY AND OCCUPATIONAL HEALTH),  
SAF/MIQ

SUBJECT: Annotated Policy Document for the American Indian and Alaska Native Policy

Members of your staff have actively participated on the internal DoD Indian Policy Working Group preparing the attached annotated policy to the American Indian and Alaska Native policy. The annotated policy has been formally coordinated and is now complete.

The annotated policy is intended to clarify key aspects of the recently released Indian Policy. You may choose to include the annotated policy with your Service specific guidance for implementing the Indian policy. Any questions concerning the annotated policy should be directed to your staff representative or to Mr. Bruce Beard of my staff at (703) 604-0521.

Thank you for your commitment to this effort.

For:   
Gary D. Vest  
Acting Deputy Under Secretary of Defense  
(Environmental Security)

Attachment:  
As stated

Environmental Security



Defending Our Future

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## Department of Defense American Indian and Alaska Native Policy

### PREAMBLE

These principles establish the Department of Defense's (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as "tribes"<sup>1</sup>)(a). These principles are based on tribal input, federal policy, treaties, and federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes<sup>2</sup> (b), DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect (c&d) protected tribal resources, tribal rights, or Indian lands<sup>3</sup> (e).

<sup>1</sup> As defined by most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the Federally Recognized Indian Tribe List Act.

<sup>2</sup> This policy is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

<sup>3</sup> Definition of Key Terms:

- **Protected Tribal Resources:** Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.
- **Tribal Rights:** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.
- **Indian Lands (ff):** Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

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(a) This policy governs Department interactions with federally recognized tribes only; it does not govern interaction with unrecognized tribes, state-recognized tribes, Alaska Native village corporations or regional corporations, or Native Hawaiians. [In Alaska, as a practical matter, the Department may need to discuss proposed actions with Alaska Native village or regional corporations simply because these corporate entities own and manage much of the land in Alaska. In such cases, the relationship between the Department and the corporate entity is a business relationship between the government and a private party, not a government-to-government relationship.]

(b) This policy neither enlarges nor diminishes the Department's legal obligations with respect to federally recognized tribes, nor does the policy provide an independent cause of action upon which the Department may be sued.

(c) The phrase "may have the potential to significantly affect," which appears throughout the policy, establishes the general threshold or "trigger" for consultation to be used unless a statute or other legal obligation specifically establishes a lower threshold for consultation. It is expected that DoD personnel will informally contact interested tribes whenever there is any real possibility that tribal interests may be affected by proposed DoD actions, but that continued, more formal consultation will be necessary only when it appears, from initial discussions with a tribe, that tribal interests will be *significantly* affected by the proposed action. In other words, the policy anticipates a two-step process designed first, to overcome the fact that, as non-Indians, we may not always recognize the effect our actions may have on tribal interests unless we ask, and second, to permit DoD to proceed without the need for further consultation unless potentially *significant* consequences are identified during this initial discussion. [Note: The word "significantly" is used in this policy in its ordinary dictionary sense; i.e., as a synonym for "material" or "important." It should not be interpreted in the NEPA or Council on Environmental Quality NEPA Regulations sense, as that would set a higher threshold for consultation than was intended.]

(d) There is no obligation to consult with tribes in advance of a proposal that "may have the potential to significantly affect" tribal interests. In other words, the obligation to consult with tribes under this policy is event- or proposal-driven. Nonetheless, as a matter of discretion, general consultation may be desirable where an installation expects to have frequent interaction with a tribe and wishes to establish a stand-by protocol for consultation absent the pressures associated with a particular proposal.

(e) The phrase "protected tribal resources, tribal rights, or Indian lands," which appears throughout the policy, works in conjunction with the "may have the potential to significantly affect" trigger to determine when DoD must consult with tribes. Generally speaking, DoD must consult with tribes only when its proposed actions may have the potential to significantly affect

Indian lands, treaty rights, or other tribal interests protected by statute, regulation, or executive order. [Note: Some statutes may establish a lower threshold for consultation than the default threshold established in this policy (see, e.g., 16 U.S.C. 470a(d)(6)(B)); in such cases, the Department must consult with tribes in accordance with the statutory requirements.] [Note also, that individual rural residents of Alaska, including both Natives and non-Natives, generally have a right to engage in nonwasteful subsistence uses of fish, wildlife, and other wild, renewable resources on public lands in Alaska.. While this right is not a *tribal* right *per se*, installations nonetheless may find it both convenient and beneficial to consult with the appropriate Alaska Native entity whenever a proposed DoD action may have the potential to adversely affect the subsistence activities of several members of the same village or tribe.]

(f) With respect to Alaska, the term "Indian Lands" does not include lands held by Alaska Native Corporations or lands conveyed in fee to an Indian Reorganization Act entity or traditional village council; the term may include village-owned townsite lands (depending on the particular status of the village itself and upon a fact-specific inquiry into whether the area at issue qualifies as a dependent Indian community), and individual Native townsite lots and Native allotments (so long as these properties remain in either restricted fee or trust allotment form).

## I. TRUST RESPONSIBILITIES

DoD will meet its responsibilities to tribes. These responsibilities are derived from:

- Federal trust doctrine (g) (i.e., the trust obligation of the United States government to the tribes);
- Treaties, Executive Orders, Agreements, Statutes, and other obligations between the United States government and tribes, to include:
  1. Federal statutes (e.g., Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, National Historic Preservation Act, Alaska National Interest Lands Conservation Act, Alaskan Native Claims Settlement Act, and Archeological Resources Protection Act); and
  2. Other federal policies (e.g., Executive Order 12898, "Environmental Justice"; Executive Order 13007, "Indian Sacred Sites"; Executive Order 13021 "Tribal Colleges and Universities"; "Executive Memorandum: Government to Government Relations with Native American Tribal Governments," dated 29 April 1994; and Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments").

DoD will annually review the status of relations with tribes to ensure that DoD is:

- Fulfilling its federal responsibilities; and
- Addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands.

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(g) Under the federal trust doctrine, the United States—and individual agencies of the federal government—owe a fiduciary duty to Indian tribes. The nature of that duty depends on the underlying substantive laws (i.e., treaties, statutes, agreements) creating the duty. Where agency actions may affect Indian lands or off-reservation treaty rights, the trust duty includes a substantive duty to protect these lands and treaty rights "to the fullest extent possible." Otherwise, unless the law imposes a specific duty on the federal government with respect to Indians, the trust responsibility may be discharged by the agency's compliance with general statutes and regulations not specifically aimed at protecting Indian tribes.

## II. GOVERNMENT TO GOVERNMENT RELATIONS

Build stable and enduring relationships with tribes by:

- Communicating with tribes on a government-to-government basis (h) in recognition of their sovereignty;
- Requiring meaningful communication addressing tribal concerns between tribes and military installations at both the tribal leadership-to-installation commander and the tribal staff-to-installation staff levels (i);
- Establishing a senior level tribal liaison in the Office of the Secretary of Defense (j) and other appropriate points of contact within DoD to ensure that tribal inquiries are channeled to appropriate officials within DoD and responded to in a timely manner;
- Providing, to the extent permitted by DoD authorities and procedures, information concerning opportunities available to tribes to: 1) compete for contracts, subcontracts, and grants, and participate in cooperative agreements; 2) benefit from education and training; 3) obtain employment; and 4) obtain surplus equipment and property;
- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made (k);
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests (l) for information from tribes.

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(h) Indian tribes have been called "domestic dependent nations"--i.e., nations within a nation. As such, consultation with tribes on a "government-to-government basis" requires a high degree of formality (see attached sample framework for consultation). Unless--or until--a tribal-specific protocol for consultation has been developed, formal contact with a tribe should be made by the installation commander, and should be directed to the tribe's senior elected official, usually referred to as the tribal chair, governor, or president.

(i) Although communication with tribes on a government-to-government basis demands attention--at least initially--at a relatively senior level of command, the goal should be to develop mutually acceptable protocols or procedures that will allow most day-to-day liaison and work with interested tribes to be accomplished on a staff-to-staff basis (see attached protocol template). Senior commanders and tribal leaders should be kept apprised of this day-to-day interaction, but--once these protocols are in place--need act personally and directly only when requested to do so by the other party.

(j) Although the Deputy Under Secretary of Defense for Environmental Security will provide tribes with a senior-level liaison to ensure tribal inquiries are promptly addressed, DoD officials at all levels of command should strive to make it easier for tribes to receive timely answers to the questions they may have concerning DoD activities that may affect them. One way to accomplish this at the installation level could be to designate and announce a principal point-of-contact for the receipt of tribal inquiries.

(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes *before* decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.

(l) Keep in mind that many tribes have relatively few enrolled members and only a limited staff to respond to your requests. This being the case, coordinate your requests for information with other federal agencies whenever doing so may reduce the administrative burden on the affected tribe.

### III. CONSULTATION

Fully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

- Recognizing that there exists a unique and distinctive political relationship between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority (m);
  - Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to (n) by the particular tribe and DoD, including necessary dispute resolution processes;
  - Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;
  - Consulting in good faith throughout the decision-making process (o); and
  - Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.
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(m) What constitutes "due consideration...consistent with tribal sovereignty" depends, in part, on the underlying law that dictates that consultation take place. "Consultation" can vary from simple notice of a pending action to negotiation to obtain the tribe's formal consent to a proposed action (the absence of which may be enough to stop that action from proceeding). The attached table summarizes the specific legal obligations owed tribes under the trust doctrine and various statutes. In general, two principles should be kept in mind. One, tribes are not just another interested party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation. Second, in most cases, consultation should include an invitation to potentially affected tribes to provide information to DoD concerning actions that may significantly affect tribal interests; that information should be given special consideration. In some instances, e.g., where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible.

(n) There are over 570 federally recognized Indian tribes, each with its own distinctive cultural identity. Just as is true with foreign nations, a "one-size-fits-all" prescription for consultation with Indian tribes is neither appropriate nor possible. Instead, installations should expect to have to negotiate a mutually agreeable protocol with each separate tribe with which it must consult. While certain elements can be expected to be a part of any such protocol (see attached protocol template), installations should be mindful of the fact that tribes all have different ways of controlling property, harvesting natural resources, revering the environment, and even conducting consultations.

(o) Keep it in mind that the consultation trigger contemplates a two-step process. Consultation need continue throughout the decision-making process only for those proposals that have the potential to *significantly* affect tribal interests.

#### IV. NATURAL AND CULTURAL RESOURCES PROTECTION

Recognize and respect the significance tribes ascribe to certain natural resources and properties of traditional or customary religious or cultural importance by:

- Undertaking DoD actions and managing DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights to fish, hunt, and gather resources at both on- and off-reservation locations (p);
- Enhancing, to the extent permitted by law, tribal capabilities to effectively protect and manage natural and cultural tribal trust resources whenever DoD acts to carry out a program that may have the potential to significantly affect those tribal trust resources (q);
- Accommodating, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred and off-reservation treaty fishing, hunting, and gathering sites located on military installations; and
- Developing tribal specific protocols to protect (r), to the maximum extent practicable and consistent with the Freedom of Information Act, Privacy Act, National Historic Preservation Act, and Archeological Resources Protection Act, tribal information regarding protected tribal resources that has been disclosed to, or collected by, the DoD.

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(p) Fulfillment of the trust responsibility demands that federal agencies protect the lands and habitats that support the resources upon which the meaningful exercise of tribal hunting, fishing, and gathering rights depend. This includes actions on non-Indian-owned lands (including DoD installations) that may affect Indian lands or off-reservation treaty rights (such as reserved rights to hunt, fish, or gather on treaty-ceded lands or "usual and accustomed" grounds and stations). In addition, in Alaska, DoD must endeavor to protect the continued viability of all wild, renewable resources in order to minimize, to the extent possible, the adverse effects of its actions on rural residents who depend upon subsistence uses of such renewable resources.

(q) Where a proposed DoD action may have the potential to significantly affect tribal *trust* resources (i.e., Indian lands or treaty rights to certain resources) or DoD has been given express statutory authority (e.g., §8050 of the Department of Defense appropriations Act of FY 1999), DoD may have limited authority to help develop and enhance the affected tribe's capacity to better manage these resources. This, however, is an area fraught with fiscal law pitfalls; consequently, installations are advised to consult with legal counsel before committing to expend appropriated funds for this purpose.

(r) Presently, legal authority to protect tribal information concerning sacred sites is very limited. Section 9 of the Archeological Resources Protection Act (16 U.S.C. § 470hh) and Section 304 of the National Historic Preservation Act (16 U.S.C. § 470w-3) may provide some protection from a request for such information, but may not be enough to guarantee confidentiality in the face of a Freedom of Information Act request for disclosure--especially the NHPA provision. A written consultation agreement with a tribe may be appropriate in some circumstances and permit an installation to withhold disclosure under FOIA Exemption 5, but even this tactic may prove to be ineffective. As a consequence, installations should be careful not overstate their ability to keep sensitive tribal information confidential.